United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Original - Affidavit of Mailing

74-1365

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P/S

To be argued by
JAMES W. DOUGHERTY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1365

UNITED STATES OF AMERICA,
Appellant,

—against—

PABLO BERRIOS, WILLIAM NUCHOW,
MATTHEW PRINCIPE, JULIUS ZARETSKY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

DENIS E. DILLON,
JAMES W. DOUGHERTY,
Special Attorneys,
U.S. Department of Justice.

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Preliminary Statement

This is an appeal by the United States of America from the February 8, 1974 order of the United States District Court for the Eastern District of New York (Judd, *J.*) dismissing indictment 73 Cr. 308 against all defendants because of the Government's non-compliance with its previously entered orders of November 22, 1973 and January 7, 1974 compelling the Government to disclose to the Court and defense counsel the memorandum submitted to Justice Department personnel in Washington, D.C., recommending that prosecution of the defendants be initiated. The Court's initial order was predicated on defendant Berrios' allegation of selective prosecution and oral proffers submitted in support thereof.

It is the position of the Government on this appeal that Judge Judd's order compelling disclosure of the prosecutive memorandum violates the proscription of F.R. Crim. P. 16(b) which exempts internal governmental memoranda from compulsory disclosure.

The Government submits, further, that the defendants have failed to establish a *prima facie* case of selective prosecution, that no factual basis exists in the record to support a colorable entitlement for the relief granted, and that *Brady* v. *Maryland,* 373 U.S. 83 (1963), cited as authority by the Court in its January order, does not support the proposition for which it is cited.

Statement of Facts

On January 8, 1973, the defendant Pablo Berrios was indicted for violating 29 U.S.C. § 504 by wilfully holding union office within five years after his conviction of arson in the Supreme Court of New York, Bronx County (App. 1). A superseding indictment filed on March 26, 1973, repeated substantially the same charge against defendant Berrios and also charged defendants William Nuchow, Matthew Principe and Julius Zaretsky, in Count Two, with violating 29 U.S.C. § 504 by wilfully and knowingly permitting defendant Berrios to hold union office after his conviction (App. 2-3). Thereafter, defendant Berrios moved to dismiss the indictment on the grounds that Section 504 violates the First, Fifth and Fourteenth Amendments, the constitutional prohibition against bills of attainder (Article I, Section 9, Clause 3), and finally, that Section 504 was preempted by Section 7 of the National Labor Relations Act (29 U.S.C. § 157) (App. 5, 6).

The defendant Berrios asserted as a separate ground for dismissal that he was the victim of a "selective prosecution" in violation of the equal protection clause of the Fourteenth Amendment (App. 24).

Defendants Nuchow and Zaretsky moved for disclosure of any electronic surveillance to which the defendants had standing to object, including surveillance of their counsel. All defendants joined in the motions of the other defendants.

On October 12, 1973, the Court heard oral argument on the defendants' motions (App. 31). Through counsel, the defendant Berrios stated that he would show the following at a "selective prosecution hearing" if such a hearing were ordered by the Court: (1) That since 1959 there have been only a few prosecutions under 29 U.S.C. § 504 and since 1969 there have been only three; (2) that Berrios was indicted after having been involved in a labor dispute with the Marriott Corporation;* (3) that Mr. Marriott was the chairman of President Nixon's 1968 and 1972 campaign organizations; (4) that Donald Nixon, the President's brother, is a vice-president of Marriott; (5) that Marriott's attorney, Herbert Kalmbach, is also President Nixon's attorney; (6) that there was an internal battle in the Teamster's Union between those who supported President Nixon's campaign for re-election and those who supported the candidacy of Senator McGovern; and (7) that defendant Berrios was one of the few Teamster officials who publicly supported Senator McGovern.

The Government maintained that defendant Berrios had failed to make out a *prima facie* case of selective prosecution to warrant the conduct of an evidentiary hearing, that there had been no demonstration of an intentional and purposeful discrimination by the Government or that the defendant was the victim of an arbitrary and invidious classification based upon constitutionally prohibited criteria.

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* Indictment number 72 Cr. 1222, Eastern District of New York. The defendant was acquitted after a jury trial before Judge Judd on February 7, 1973 of a charge of attempting to firebomb a Marriott restaurant at JFK International Airport. 18 U.S.C. § 844(i). The Court noted in its January 8, 1974 order herein that "the acquittal, of course, determined only that there was a reasonable doubt of his guilt."

At the completion of argument, the Court orally ordered the Government, *inter alia,* to provide defense counsel and the Court with a copy of the memorandum recommending prosecution of the defendants.

Government counsel offered to submit the prosecutive memorandum to the Court for review in exchange for an assurance that the memorandum would not then be supplied to defense counsel over Government objection. The offer was refused (App. 61-63).

By letter dated November 16, 1973 signed by Denis E. Dillon, Attorney in Charge, Organized Crime & Racketeering Section, Brooklyn Field Office, Department of Justice, the Government reiterated the position maintained at the oral argument that the prosecutive memorandum is not discoverable and formally refused to comply with the Court's oral order of October 12, 1973 and written order of November 26, 1973 (App. 85).

The defendants moved to dismiss the indictment based on the Government's refusal to comply with the Court's orders. The motion was granted on January 7, 1974 (App. 95) and the indictment was dismissed on February 8, 1974 (App. 114).

On March 8, 1974, the United States of America filed its notice of appeal.

ARGUMENT

POINT I

Defendant has failed to establish a *prima facie* case of selective prosecution.

Defendants' allegation of selective prosecution consists of two separate but interrelated assertions:

1. The paucity of prosecutions under 29 U.S.C. Section 504 raises an inference of prosecutorial selectivity; and

2. The combination of factors surrounding the efforts of the defendant Berrios' local to organize the employees of a Marriott-owned restaurant at Kennedy Airport and the close personal relationship between the officers of Marriott and President Nixon creates a doubt about the prosecutor's motives in advancing the instant prosecution.

The Court below found that defendant's offer of proof was similar to that made in *United States* v. *Falk,* 479 F.2d 616 (7th Cir. 1973) (*en banc*), and, as such, sufficient to create a *prima facie* case of selective prosecution.

The Government contends that the defense proffer does not amount to an initial showing of selective prosecution, but, at best, a coincidence of events having no correlation to the facts of the instant prosecution.

Clearly, encroachment upon the restrictive ground of executive control over criminal prosecutions should not be allowed unless the defendant can establish evidence sufficient to raise a reasonable doubt about the prosecutor's purpose. The test, first enunciated in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1885), has been subsequently refined by the

Supreme Court. *Boyle* v. *Landry,* 401 U.S. 77, 81 (1971); *Edelman* v. *California,* 344 U.S. 357 (1953); *Snowden* v. *Hughes,* 321 U.S. 1, 8 (1944). "[I]n addition to unequal application the defendant must also prove the element of intentional and purposeful discrimination (*i.e.,* bad faith)." *United States* v. *Ahmad,* 347 F. Supp. 912 (M.D. Pa. 1972), *aff'd sub nom., United States* v. *Berrigan,* 482 F.2d 171 (3d Cir. 1973). Intentional and purposeful discrimination can be established where the prosecution is based upon an unjustifiable standard or an invidious or inherently suspect classification, amounting to intentional and purposeful discrimination.

The Court's reliance upon *United States* v. *Falk, supra,* appears misplaced. Falk was prosecuted for his failure to possess the required selective service card. The *en banc* hearing focused upon the dividing line between presumptive regularity in the enforcement of penal laws and impermissible prosecutorial selectivity. The defendant alleged that he was singled out for selective and discriminatory treatment on the basis of his draft activities. The defendant, an active member in a draft counseling organization, offered to prove that some 25,000 selective service registrants had dispossessed themselves of their draft cards without criminal sanctions, despite Government awareness of many violations. Also before the Court was an official policy statement by the Director of the Selective Service System of not prosecuting those who turned in their cards.

The Assistant United States Attorney told Falk's attorney that he knew of defendant's draft counseling activities, that a good deal of their trouble in enforcing the draft laws came from people such as Falk, that few indictments were brought for non-possession of draft cards, and that defendant's draft counseling activity was one of the reasons why the prosecution was brought. He advised the Court that the prosecution of Falk was approved not only by him, but also by the Chief of the Criminal Division of the United

States Attorney's Office, the First Assistant United States Attorney, the United States Attorney, and the Department of Justice. No explanation was offered for the existence of a delay in the bringing of the indictment of almost three years.

Based upon the particular circumstances surrounding Falk's prosecution, the Court found "unrebutted evidence . . . [which] . . . made out at least a *prima facie* case of improper discrimination in enforcing the law." 479 F.2d at 623. The hearing was premised upon an allegation of "intentional, purposeful discrimination" and the existence of "facts sufficient to raise a reasonable doubt about the prosecutor's purpose."

The evidence to support Falk's contention that prosecution was authorized "at the top" bears little resemblance to Berrios' proffer below. *Falk* evidences actual authorization, despite a policy statement to the contrary. The only evidence offered by the defendant to support his contention is the close association between Marriott and the President. Clearly, the Court had to infer from a mere coincidence authorization which is simply not proven. We submit that there is simply no basis for such an inference; neither is there evidence to support the contention that defendant is being prosecuted for exercising his rights under the First Amendment. The proffer in this case merely indicated that the defendant Berrios was a vocal supporter of McGovern. There is no evidence that this fact was the basis of the prosecution.

The Government submits that the defendant has failed to meet the test for judicial review announced in *Yick Wo, supra,* and refined in later cases, notably *United States* v. *Berrigan,* 482 F.2d 171 (1973), wherein the Court noted:

> "Without denigrating the importance of the right of a person accused of a crime to establish the presence of discriminatory prosecution, central to the issue

> must be some initial showing that there is a colorable basis for the contention." 482 F.2d at 177.

While defendant dwelt upon the importance of the Marriott-related contentions at the argument below, it is equally clear that the defendant hoped to carry his burden of establishing a *prima facie* case by stressing the uneven history of Section 504 prosecutions. At page 9 of the October 12 hearing transcript, Mr. Garbus submits:

> "If, in fact, there were many many prosecutions, then I think the Judge would not tend to look favorably upon my motion. If, on the other hand, the information that I had given the Judge is accurate, he might feel compelled to go further on a motion."

Courts have consistently refused to review a prosecutor's decision to prosecute on the strength of similar allegations of selectivity based upon numerical valuations of statutory use, absent a showing of invidious discrimination. Thus, in *Oyler* v. *Boles,* 368 U.S. 448, 456 (1962), the Court held:

> "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."

See also, *United States* v. *Gebhart,* 441 F.2d 1261 (6th Cir.), *cert. denied,* 404 U.S. 855 (1971). To require the Government to literally treat every offense and every offender alike would "negate discretion," *Newman* v. *United States,* 382 F.2d 479 (D.C. Cir. 1967), and ignore the incompatibility of prosecutorial and judicial functions. See, *United States* v. *Cox,* 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965).

In short, the Government submits the mere showing that "the enforcement of the law is lax, or even that other offenders go free," is not sufficient to sustain a selective prosecution defense. *United States* v. *Malinowski,* 347 F. Supp. 347, 353 (E.D. Pa. 1972), *aff'd,* 472 F.2d 850 (3d Cir.

1973), *cert. denied,* 411 U.S. 970 (1973). "Mere failure to prosecute others similarly situated does not constitute a violation of due process or equal protection." *United States* v. *Ahmad,* 347 F. Supp. 912 (M.D. Pa. 1972), *aff'd sub nom., United States* v. *Berrigan,* 482 F.2d 171 (3d Cir. 1973). Consequently, we submit that the defendant has not met the burden of establishing a *prima facie* case of selective prosecution, and therefore is not entitled to discovery of the prosecutive memorandum or to a selective prosecution hearing.

POINT II

The prosecutive memorandum is specifically exempted from discovery as an internal Government document under F.R. Crim. P. 16(b).

The Court considered and rejected the Government's Rule 16(b) objection to the order compelling discovery, noting at page 17 of the opinion:

> "This Court's action in ordering the production of the memorandum recommending prosecution is not inconsistent with Rule 16(b) of the Federal Rules of Criminal Procedure. That rule governs pretrial discovery. It does not dictate the procedure to be followed by the district courts in the actual conduct of hearings."

Federal Rules of Criminal Procedure, Rule 16(b) provides in part that the discovery authorized by Rule 16 "does not authorize the discovery or inspection of reports, memoranda, or other internal Government documents made by Government agents in connection with the investigation or prosecution of the case * * *."

The rule has been construed to bar discovery of internal memoranda in a variety of situations.

In *Gollaher* v. *United States,* 419 F.2d 520 (9th Cir. 1969), *cert. denied,* 396 U.S. 960, defendants in an 18 U.S.C. §§307, 1001 and 1010 prosecution sought discovery of internal Federal Housing Administration memoranda in an attempt to demonstrate that F.H.A.'s attitude in pursuing the prosecution was one of bias, relying on *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Dennis* v. *United States,* 384 U.S. 855 (1966).

The Court below denied the request, and the 9th Circuit found no abuse of discretion, observing that

> "[W]hile 'the determination of what may be useful to the defense can properly and effectively be made only by an advocate,' * * * the materials upon which such a determination is sought to be made must in the first instance be discoverable. . . ." (citations omitted).

Cf. *United States* v. *Marks,* 364 F. Supp. 1022, 1029 (E.D. Ky. 1973).*

Similarly, in *United States* v. *Berrigan, supra,* the Court recognized the prohibition of Rule 16(b) in rejecting a defense claim of error based upon the denial of discovery of internal Government documents by the trial court, where the appellants therein had failed to meet their burden of proving a colorable entitlement to the defense of discriminatory prosecution.

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* In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973), Mr. Justice White, in considering Exemption 5 of the Freedom of Information Act of 1966, 5 U.S.C. § 552, noted the weight of authority according different treatment to matters reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other. Accord: Proposed Rules of Evidence for United States Courts and Magistrates, Rule 509(a)(2)(A).

In summary, the Government submits that the prosecutive memorandum is not discoverable under Rule 16(b) of the Federal Rules of Criminal Procedure, and that no distinction exists either in the rule or any recognized exception thereto between pre-trial discovery and pre-trial hearings. We submit, further, that *Brady* v. *Maryland, supra,* does not authorize "judicial inquisition into the process whereby prosecutorial decisions are formulated." *United States* v. *Berrigan, supra.*

CONCLUSION

The order of the District Court compelling production of the prosecutive memorandum should be vacated and the order dismissing the indictment should be reversed.

Respectfully submitted,

Dated: April 25, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

DENIS E. DILLON,
JAMES W. DOUGHERTY,
Special Attorneys,
U.S. Department of Justice.

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25th day of April 1974

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Deborah J. Amundsen
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Dated: Brooklyn, New York,

_____, 19____

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

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